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No. 93-521

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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AT&T does not dispute that the question presented involves a matter of exceptional importance to the telecommunications industry. Nor could it plausibly so argue. As we explain in our petition, the FCC's permissive detariffing policy has played a central role in opening the long distance market to competition. In the rulemaking order that is at issue, the Commission noted that the number of long distance carriers had increased from about 12 to about 482 since it began its efforts to relieve non-dominant carriers from tariffing burdens, and also cited evidence supporting its conclusion that detariffing was an important factor in promoting competition during the last decade. 93-356 Pet. App. 30a-31a. The amicus briefs supporting the petition that have been filed

both by smaller telephone companies and by long-distance customers attest to the fact that the court of appeals' invalidation of the Commission's policy will impede the further development of competition in the telecommunications industry.

AT&T argues that review is not warranted because, in its view, the D.C. Circuit properly interpreted Section 203 of the Communications Act of 1934, 47 U.S.C. 203. AT&T bases its contention primarily on this Court's decision in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), in which the Court held that the ICC could not excuse a trucker's deviation from its filed rates. The D.C. Circuit, which merely cited that case in a footnote and said that its decision was "somewhat buttressed" by *Maislin*, 93-356 Pet. App. 53a n.12, was right insofar as it recognized that *Maislin* offers, at most, attenuated support (by analogy) for its holding. *Maislin* involved a different issue (whether truckers must follow rates that have been filed, rather than whether the FCC may relieve non-dominant long-distance companies from filing tariffs) decided under a different statute (the Interstate Commerce Act rather than the Communications Act).

While emphasizing a case that did not present the question presented here, AT&T has failed to respond to our analysis of the language of the statute that is at issue. As we explain in our petition (at pp. 12-13), the decision of the D.C. Circuit is flawed because Section 203(b)(2) authorizes the Commission to "modify any requirement" of Section 203, yet the D.C. Circuit's decision does not permit the Commission to modify the tariff-filing requirement set out in Section 203(a). In other words, although the statute says that the Commission may modify *any* requirement of Section 203, the D.C. Circuit has construed that to mean that the FCC may

not modify the primary requirement set out in the provision. Neither the D.C. Circuit nor AT&T has suggested why it is permissible to ignore the statutory term "any" and thereby sharply curtail the Commission's authority. Instead, AT&T suggests without explanation that the FCC may not modify what AT&T terms "core tariff filing requirements," but may modify only "additional requirements of the Act" and the requirements in "FCC regulations detailing the content and form of tariff schedules, how they must be displayed and transmitted, and similar details." Br. in Opp. 16. But the statute says that the Commission may modify any requirement of Section 203, not just secondary rules pertaining to details. At the least, the Commission reasonably construed "modify any requirement" to authorize it to modify the tariff-filing requirement. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

AT&T also suggests that the petition for a writ of certiorari has been filed both too late and too early. It is too late, in AT&T's view, because an "unpublished order" is at issue. Br. in Opp. 7. But that is so only because the D.C. Circuit decided to stand on the opinion it issued in November 1992 in the adjucatory proceeding rather than revisit the question presented in light of the rulemaking proceeding and record that resulted in a Commission order issued that same month. We opposed the petition that was filed challenging the D.C. Circuit's decision in the adjudicatory proceeding because, we explained, the Court should have the Commission's rulemaking determination and record before it when examining the question presented. 92-1684 Gov't Br. in Opp. Both the rulemaking order and the D.C. Circuit's rejection of the Commission's reading of the Communications Act are now before the Court.

AT&T's argument that the petition is premature is premised on the fact, mentioned in our petition (at pp. 18-19 n.*), that the Commission responded in August 1993 to the decision of the D.C. Circuit (which has jurisdiction to review all final orders of the FCC, 28 U.S.C. 2342, 2343) by authorizing "range of rate" filings, which relieve non-dominant carriers of some (but not all) of the burdens of filing tariffs. AT&T, which has argued that the "range of rates" rulemaking order is "unlawful for the same reason" that it contends the rulemaking order at issue is unlawful (Br. in Opp. 22), suggests that "the petitions are at best premature" until the D.C. Circuit addresses the FCC's most recent order. There is no merit to that argument. The FCC's interpretation of Section 203 is before the Court in this proceeding, which challenges the policy that the Commission believes best fosters competition in the long-distance market. Moreover, if the Commission prevails in the "range of rates" case, it will not have the opportunity to seek review in this Court to argue that its permissive detariffing policy is permissible. Accordingly, this is the case that warrants review by this Court.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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